INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Argument	8
Conclusion	18

CITATIONS

Cases:

Agwilines, Inc., v. *National Labor Relations Board*, 87 F. (2d) 146	12
Associated Press v. *National Labor Relations Board*, 301 U. S. 103	9, 13
Consumers Power Co. v. *National Labor Relations Board*, 113 F. (2d) 38	9
Hamilton-Brown Shoe Co. v. *National Labor Relations Board*, 104 F. (2d) 49	12
Helvering v. *Gowran*, 302 U. S. 238	11
Helvering v. *Rankin*, 295 U. S. 123	11
Interstate Circuit, Inc. v. *United States*, 306 U. S. 208	12
Montgomery Ward & Co., Inc. v. *National Labor Relations Board*, 107 F. (2d) 555	12
National Labor Relations Board v. *A. S. Abell Co.*, 97 F. (2d) 951	9
National Labor Relations Board v. *Bachelder*, decided March 13, 1941 (C. C. A. 7th)	12
National Labor Relations Board v. *Express Publishing Co.*, 111 F. (2d) 588, modified and affirmed, No. 442, this Term, decided March 3, 1941	8, 9, 17
National Labor Relations Board v. *Hearst*, 102 F. (2d) 658	9
National Labor Relations Board v. *Kentucky Fire Brick Co.*, 99 F. (2d) 89	12
National Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584	11
National Labor Relations Board v. *Louisville Refining Co.*, 102 F. (2d) 678, certiorari denied, 308 U. S. 568	12

Cases—Continued. Page

National Labor Relations Board v. *Remington Rand, Inc.*, 94 F. (2d) 862, certiorari denied, 304 U. S. 576 12

National Labor Relations Board v. *Star Publishing Co.*, 97 F. (2d) 465 9

National Labor Relations Board v. *Sunshine Mining Company*, 110 F. (2d) 780 9

National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U. S. 206 11

Newport News Shipbuilding & Dry Dock Co. v. *National Labor Relations Board*, 101 F. (2d) 841, reversed on other grounds, 308 U. S. 241 9

North Whittier Heights Citrus Assn. v. *National Labor Relations Board*, 109 F. (2d) 76, certiorari denied, 310 U. S. 632 12

Southern Colorado Power Co. v. *National Labor Relations Board*, 111 F. (2d) 539 9

Stewart Die Casting Corp. v. *National Labor Relations Board*, 114 F. (2d) 849, certiorari denied, No. 615, this Term, January 13, 1941 10

Statute:

National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 449 (29 U. S. C., Supp. V, Secs. 151 *et seq.*):

Sec. 2 (2) 3

Sec. 7 10

Sec. 8 (1) 7, 8, 13

Sec. 8 (3) 4, 7, 8, 13

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1046

THE PRESS CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion and supplemental opinions of the court below (R. 1307–1329, 1345–1346, 1354–1357) are not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1211–1232) are reported in 13 N. L. R. B. 630.

JURISDICTION

The supplemental decree of the court below (R. 1358–1359) was entered on March 24, 1941. The petition for a writ of certiorari was filed on May 12,

1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Board.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act is applicable to petitioner, a newspaper publisher which receives daily from sources outside the State material for publication, prepares news reports for transmission to newspapers in other States, and receives in interstate commerce substantial quantities of the supplies necessary in publishing its newspaper.

2. Whether there is substantial evidence to support the Board's findings that petitioner discriminatorily discharged three of its employees in violation of Section 8 (1) and (3) of the Act.

3. Whether the court below departed from established principles of review under the Act (a) by supplying essential findings which the Board failed to make; (b) by referring, in support of a particular finding of the Board, to evidence not specifically mentioned in the Board's decision; or (c) by holding that the employer's failure to offer testimony by its official who selected the employees for discharge was a relevant consideration in determining whether they were discharged because of union activities.

4. Whether the Board's refusal to accept as conclusive petitioner's bare assertion that it had discharged the employees upon the basis of "fitness and merit" infringed the freedom of press guaranteed to petitioner by the First Amendment.

5. Whether the Board prejudged the case and was biased against petitioner.

6. Whether the decree requiring petitioner to cease and desist from "in any way interfering with the administration of the [Tri-City Newspaper] Guild or its members," which the court substituted for the Board's general cease and desist order, is too broad.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix to the petition (pp. 61–66).

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 1211–1232). The pertinent facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

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[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence. We omit from the statement the Board's findings that by reason of its active control over petitioner's labor and other policies the Gannett Company was an "employer" of the employees involved within the meaning of Section 2 (2) of the Act (R. 1214–1217) and the findings that Ray Mowers was discriminated

Petitioner is a newspaper publisher at Albany, New York (R. 1214; 52). During the several months prior to the hearing the extra-state circulation of petitioner's newspapers varied between 1 and 3 percent of the total circulation, which approximated 50,000 copies daily (R. 1217; 107). In the first 7 months of 1937 more than 90 percent by value of the 5,870,000 pounds of newsprint paper used by petitioner came to its plant in foreign and interstate commerce (R. 1218; 102–104). During the same period petitioner received 100,000 pounds of ink valued at $3,000 from without the state (*ibid.*). Petitioner receives from and supplies to the Associated Press news reports which are transmitted over the interstate wires of that organization (R. 1218; 138, 140–141, 144, 169–175, 176). And substantial quantities of the syndicated articles and comic strips used by petitioner are sent to it from points in other states (R. 1218; 118, Bd. Exhs. 23A, 24A, 25A). The Board found that unfair labor practices by petitioner tend to lead to labor disputes burdening and obstructing commerce (R. 1228).

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against in violation of Section 8 (3) (R. 1227–1228). The court below set aside the entire order against the Gannett Company (R. 1316–1319, 1358), and likewise set aside the reinstatement and back-pay order as to Mowers (R. 1313–1314, 1358). While we believe these modifications to be erroneous, we do not regard them as raising questions of sufficient importance, in the circumstances of this case, to warrant a petition for certiorari on behalf of the Board.

During 1936 and early 1937 petitioner engaged in collective bargaining with the Tri-City Newspaper Guild, a labor organization representing its employees; the parties frequently disagreed and on one occasion the Guild accused petitioner of lack of good faith and threatened to call a strike (R. 1219–1220; 279–281, 286, 303–304, 309, 310, 312, 313–320, 322–323, 325, 458, 464–465, 467, Bd. Exhs. 61, 63, 73). Editorial Director Lewis, the central figure in all of petitioner's unfair labor practices, was avowedly hostile to the Guild:[2] he repeatedly stated that he could not run an editorial room with the Guild present, compared its members to hod carriers rather than professional men, referred to them as "Guild rats," claimed that "the God-damned labor union is wrecking this newspaper" and stated that petitioner was cutting his funds because of the Guild (R. 1221; 382, 429, 436–439, 508, 510, 548, 585, 589, 591, 628, 688–689, 708, 736). The Board found that by Lewis' statements petitioner interfered with, restrained and coerced its employees in the exercise of their rights of self-

[2] Petitioner in effect admitted this hostility. After the Guild passed a strike vote in February 1937, Cruickshank, the secretary of both petitioner and the Gannett Company, promised that the intimidation with which the Guild charged Lewis would cease, and designated Publisher McDonald to act as petitioner's bargaining representative in place of Lewis (R. 184–191, 320, 322, 323, 325, 328–330, 355, 712, 1101–1102, Bd. Exh. 65, see R. 1220).

organization and collective bargaining (R. 1221, 1230).

On the mornings after Guild meetings Lewis would dictate letters to petitioner's principal office at Rochester describing what transpired at the meetings (R. 1221–1222; 688–689). The Board rejected petitioner's contention (see R. 834, 1003, 1081, 1083–1084) that Lewis obtained this information by overhearing casual office conversation and drew the inference from the prompt and detailed nature of his reports, that Lewis obtained his information through espionage and surveillance (R. 1222–1223). The Board specifically found that by keeping Guild meetings and the activities of Guild members under suveillance petitioner interfered with, restrained, and coerced its employees in their exercise of the rights guaranteed in Section 7 of the Act (R. 1223).

In June 1937 petitioner entered into an agreement with a rival publisher providing that petitioner cease publication of its morning and Sunday newspaper in return for the rival's abandonment of the evening field (R. 1223; 1085, 1098, 2361). To effect the reduction of personnel thus made possible, petitioner's department heads were instructed to "select an adequate staff from the people best qualified to serve their needs" (R. 1223; 1100–1101). Lewis, whom petitioner had replaced as its representative in dealing with the Guild because of his hostility toward that organization and

unionism in general (*supra*, p. 5), made the selection of editorial employees to be eliminated (R. 1223–1224; 352, 1103–1104, 1106). Of some 74 editorial employees, 29 were dismissed, 27 being Guild members, including 6 officers; 11 of the 45 retained were not members of the Guild (R. 1223; 71, 72, 337, 351–352, 445–446, 1104). The Board found that Austin J. Scannell (R. 1225–1226; 362, 367–369, 371, 375–377, 402, 404–405, 728), John Wanhope (R. 1226; 445, 494, 497–507, 620, 690, 741) and Henry E. Christman (R. 1226–1227; 273, 280, 286, 362, 533–535, 537–538, 547, 549, 711–713, 849, 890–891) were selected by Lewis for discharge because of their union membership and activity and that Lewis discriminatorily demoted Ray A. Mowers, thereby inducing that employee to resign (R. 1227–1228; 430, 546, 629, 630, 633, 636, 643). The Board found that petitioner had discriminated against these four employees in violation of Section 8 (3) and (1) of the Act (R. 1228, 1230).

The Board ordered petitioner to cease and desist from its unfair labor practices, to reinstate with back pay the employees illegally discriminated against, and to post notices (R. 1230–1231). Thereafter, petitioner and the Gannett Company filed separate petitions in the court below to review and set aside the Board's order (R. 1–22, 23–30). The Board answered and requested full enforcement of its order against both companies (R. 31–43). On December 9, 1940, the court below

handed down its opinion (R. 1307–1319) sustaining the Board's ultimate findings that petitioner had violated Section 8 (1) and (3) of the Act and entered a decree (R. 1331–1333) enforcing against petitioner the order as issued by the Board with certain exceptions not material here.[3] Thereafter, the Board filed a petition for rehearing confined to the single question whether the court had erred in setting aside paragraph 1 (c) of the Board's order, the general cease and desist provision (R. 1334–1335). On February 14, 1941, the court entered an order amending its decree so as to reinstate paragraph 1 (c) and denying the petition for rehearing (R. 1345–1346). On March 6, 1941, after the decision of this Court in *National Labor Relations Board* v. *Express Publishing Co.*, No. 442, this Term, petitioner filed a petition for modification of the decree (R. 1346–1348). On March 24, 1941, the court, Mr. Justice Rutledge dissenting (R. 1359–1360), entered an order modifying its decree by substituting for the general cease and desist provision one requiring petitioner to cease and desist from "in any manner interfering with the administration of the Guild or its membership" (R. 1354–1359).

ARGUMENT

1. Petitioner asserts (Pet. 7–9, 23–31) that a novel and important question is presented con-

[3] Mr. Justice Rutledge dissented from each of the modifications except one (R. 1230–1231).

cerning the application of the National Labor Relations Act to a "purely local business." However, the undisputed findings (*supra,* pp. 3–4) concerning the nature and extent of petitioner's dependence upon interstate commerce both for material published in its newspaper and for supplies used in the manufacture thereof, show plainly that petitioner's enterprise differs in no significant respect from those to which the Act has repeatedly and uniformly been held to apply.[4]

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[4] On the daily interstate transmission of news items to and from petitioner and petitioner's daily receipt of other material for publication, see *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128; *National Labor Relations Board* v. *Express Publishing Co.*, 111 F. (2d) 588 (C. C. A. 5), modified and affirmed, No. 442, this Term, decided March 3, 1941; *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4); *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658 (C. C. A. 9); *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465 (C. C. A. 9). On the sufficiency of petitioner's receipt of substantial supplies from without the state to base the Board's jurisdiction, see *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board*, 101 F. (2d) 841, 843 (C. C. A. 4), reversed on other grounds, 308 U. S. 241; *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. (2d) 38, 40 (C. C. A. 6); *National Labor Relations Board* v. *Sunshine Mining Company*, 110 F. (2d) 780, 784 (C. C. A. 9); *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. (2d) 539, 543 (C. C. A. 10). There are no contrary decisions under the Act.

2. Petitioner contends (Pet. 9–10, 31–34) that the Court of Appeals departed from the principles of review established under the Act by supplying a necessary finding, which the Board failed to make, that through its surveillance petitioner interfered with its employees' union activities. But the Board expressly found that through its surveillance petitioner "interfered with, restrained and coerced [its] employees in the exercise of the rights guaranteed in Section 7 of the Act" (R. 1223).[5]

Petitioner also objects (Pet. 10, 33) that in sustaining this finding of the Board, the court referred to two items of evidence which the Board failed to mention in its decision. This argument assumes as a premise that the Board is required to recite in its decision every item of evidence upon which a particular finding is rested, at the pain of having evidence not so recited excluded from consideration upon review. But see *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. (2d) 849, 854 (C. C. A. 7), certiorari denied, No. 615, this Term, January 13, 1941. Compare

[5] The Board also found, in connection with petitioner's illegal discrimination against Guild members in selecting employees for discharge, that "by reason of his surveillance of Guild activities, Lewis was thoroughly acquainted, not only with the Guild membership, but also with the degree of participation of the individual members and their relative importance in the affairs of the organization" (R. 1224).

Helvering v. *Gowran*, 302 U. S. 238, 245–246; *Helvering* v. *Rankin*, 295 U. S. 123, 132–133.[6] In any event, the Board, in finding that Lewis engaged in surveillance, did rely upon the facts that Lewis usually had his information on the day following union meetings and that the information was detailed in nature (R. 1222–1223). And the Board also referred to evidence that at a conference with one of the employees Lewis stated that he knew of the employee's union membership (R. 1221).

3. Petitioner contends (Pet. 11–12, 34–39) that a "unique question of judicial review" under the Act is presented by the fact that the Board and the court gave weight to the failure of Editorial Director Lewis to testify concerning the grounds upon which he selected the employees for discharge. Contrary to petitioner's assertion (Pet. 38), neither the Board nor the court regarded the absence of Lewis' testimony as the sole basis for the findings of illegal discrimination. The Board stated at length the evidence from which it inferred

[6] In *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, this Court, in sustaining the Board's finding that the schedule of the "S. S. Fairland" had been altered by the company with knowledge that the crew had shifted their union affiliation, stated that "The 'Fairland' is equipped with radio" (at p. 221). This fact had not been mentioned in the Board's decision, but it was plainly relevant to the question whether the Board's finding of knowledge had the requisite evidentiary support. Such instances are of frequent occurrence under the Act. See, e. g., *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584.

that Lewis had acted upon an anti-union basis (R. 1224–1228).[7] And the court, in referring to Lewis' failure to testify, did no more than to hold that the evidence upon which the Board's findings rested was substantial in the absence of contravening proof (R. 1312). This holding was neither novel nor improper. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 225–226.[8]

The further question (see Pet. 36–39) whether the Board's findings of illegal discrimination is supported by substantial evidence plainly does not call for additional review; the evidence summa-

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[7] One of the circumstances which the Board found persuasive is, as stated by the Board, the fact that "although the duty of selecting the restricted staff devolved on Lewis alone, and he alone was in a position to testify as to the basis upon which his selection was made, he was not offered as a witness and the natural inference to be drawn from his known bias against the Guild and the excessive proportion of Guild members selected for dismissal was allowed to stand without contradiction" (R. 1224–1225).

[8] See also *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 866 (C. C. A. 2), certiorari denied, 304 U. S. 576; *Agwilines, Inc.*, v. *National Labor Relations Board*, 87 F. (2d) 146, 152 (C. C. A. 5); *National Labor Relations Board* v. *Kentucky Fire Brick Co.*, 99 F. (2d) 89, 92 (C. C. A. 6); *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678, 681 (C. C. A. 6), certiorari denied, 308 U. S. 568; *National Labor Relations Board* v. *Bachelder*, decided March 13, 1941 (C. C. A. 7); *Montgomery Ward & Co., Inc.*, v. *National Labor Relations Board*, 107 F. (2d) 555, 559 (C. C. A. 7); *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49, 53 (C. C. A. 8); *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board*, 109 F. (2d) 76, 78–79 (C. C. A. 9), certiorari denied, 310 U. S. 632.

rized in the Statement (*supra*, pp. 5–7) affords abundant support for the challenged findings.

4. Petitioner contends (Pet. 13–14, 40–45) that the Board infringed the freedom of press guaranteed by the First Amendment by finding that it had discharged four employees in violation of Section 8 (3) and (1) of the Act. Petitioner does not dispute that the publisher of a newspaper has no special immunity from application of the Act, no "special privilege to invade the rights and liberties of others." *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 132–133. It contends that, in enforcing a valid regulation of its business, the Board was without power under the Constitution to go behind the defense that "fitness and merit" was the basis of selection of employees for discharge. But if the Board may not inquire into the elements considered under these vague criteria and must substitute a bare profession of innocence for factual investigation, petitioner is in fact immune from Section 8 (3) of the Act. The validity of the regulation plainly extends to an inquiry essential to its practical operation.

5. Petitioner contends (Pet. 15–17, 45–53) that the Court of Appeals should have set aside the Board's order for the reason that the Board was biased against petitioner and prejudged the issues.

(a) To support its claim of prejudgment, petitioner relies upon an article in the Guild "Bulletin" of September 5, 1937 (Pet. Exh. 4; see Bd.

Exh. 86) which contained statements that the Board would soon set a hearing date in this proceeding, that the case would be tried by a Board attorney, that Messrs. Isserman and DeGraff would represent the Guild, and that "counsel says it's airtight." There is nothing to indicate that this does not refer to Guild counsel. Petitioner also refers to testimony that at a Guild meeting Wanhope, an employee, announced that "the N. L. R. B. * * * said the Guild had an open and shut case" (R. 956, 986). The Board cannot be held answerable for enthusiastic statements of Guild members, probably based upon information that administrative officials of the Board had, after preliminary investigation of the facts by the Second Regional Office in accordance with the Board's practice, authorized issuance of the complaint. Fales, the president of the Guild (R. 273), flatly denied that any assurance or representations were made by the Board's representatives (R. 490–491).[9]

Petitioner's remaining proof of "prejudgment" (Pet. 47) is based upon the fact that during a colloquy between counsel at the hearing in regard to the position taken in the complaint that both petitioner and the Gannett Company were proper par-

[9] To bolster the inferences which it seeks to draw from this evidence, petitioner refers to "the significant fact" that the Guild withdrew from proceedings instituted by it before the New York State Department of Labor (Pet. 46). That

ties respondent, Board counsel, in stating the theory of the complaint that both companies were equally answerable under the Act for whatever unfair labor practices had occurred stated that "The Board's position is that both companies have violated the National Labor Relations Act" (R. 162, 163).[10] Plainly, the inference (that "the Board" had prejudged the case) which petitioner seeks to extract from this occurrence is preposterous.

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department has no power to remedy discriminatory discharges or other labor practices condemned by the national Act, and the New York State Labor Relations Act did not become effective until July 1, 1937. Fales, the Guild president, testified that the case was taken to the Board because of the publicity it would receive, and that the Guild had been informed that it was the Board's practice to bear the expenses of trial (R. 489–491).

[10] Compare the following remarks by Board counsel at the hearing: "The Board contends that the * * * employees were discharged not because of the merger but because of their activity in connection with the labor organization. The question of whether the Board can prove that is a question to be determined by the evidence to be presented before you" (R. 88–89); "I wish to say that the Government does not regard that information as confidential matter * * *" (R. 109); "The Board takes the position that there is no distinction between Frank E. Gannett as president of one company or as president of the other company" (R. 160); "I resent the statement that the Board is snooping into editorial matters" (R. 165). At page 124 of the record the trial examiner said that "I suppose the case will develop the theory of the Board that the Gannett Company is the parent company of The Press Co. * * *."

(b) To support its claim of bias, petitioner relies upon two unrecorded remarks which J. Warren Madden, the former Chairman of the Board, is asserted to have made at the oral argument of the case (Pet. 48).[11] When petitioner's counsel presented his "prejudgment" argument, the Chairman inquired whether he was accusing the three Board members of improper conduct. Counsel, refusing to clarify his charge, replied that he stood upon the record. The Chairman's characterization of such remarks as "sheer demagoguery," far from reflecting bias, constituted a proper exercise of the power of the Board to keep argument before it within the confines of decency (see R. 1309–1310, 1328–1329). Indeed, such conduct of counsel before a court vested with the usual contempt powers, might well have provoked a sterner and perhaps more effective reprimand (cf. R. 1328–1329).

6. Although the Court of Appeals modified the general cease and desist order (R. 1230) so as to enjoin petitioner only from "in any manner interfering with the administration of the Guild or its membership" (R. 1358), petitioner nevertheless contends (Pet. 18–19, 53–59) that the order is still too broad under the principles laid down in

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[11] The accuracy of petitioner's version of these remarks (R. 32, 39) is denied in the answers to the petitions for review, which are verified by Chairman Madden (R. 37, 43).

National Labor Relations Board v. *Express Publishing Co.*, No. 442, this Term, decided March 3, 1941. It is apparent, however, that the court's decree is not broader than is warranted by the "salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." *Express Publishing* case, *supra.* The court sustained the Board's findings that by discriminatory discharges and surveillance petitioner interfered with the membership and administration of the Guild; upon these findings, the court's decree is no broader or more indefinite than the provision framed by this Court in the *Express Publishing* case itself. Indeed, the Court of Appeals should have enforced the even broader cease and desist provision on the ground that petitioner's unfair labor practices were not "isolated acts in violation of the right of self-organization", but on the contrary, constituted "persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the court below found or could have found the threat of continuing and varying efforts to attain the same end in the future." *Express Publishing* case, *supra.* Petitioner can hardly complain that it is the beneficiary of a more narrowly framed order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941